

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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In Re Pork Antitrust) File No. 18-cv-1776
Litigation.) (JRT/HB
)

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This document relates to all)
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BEFORE THE HONORABLE HILDY BOWBEER
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(CIVIL MOTION HEARING)

Proceedings recorded by mechanical stenography;
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P R O C E E D I N G S

IN OPEN COURT

THE COURT: Good afternoon. This is the United States District Court for the District of Minnesota. I'm Magistrate Judge Hildy Bowbeer and we are gathered by zoom this afternoon for a hearing in the matter of In Re Pork Antitrust Litigation. This is matter Number 18-cv-01776.

And the particular matter that's teed up for this hearing at this time is Docket Number 1024, which is the CIIPPS's motion to compel compliance with subpoena directed to Pacific Agri-Products, Inc.

So let me find out first who I've got with me this afternoon for the parties that are directly involved in that motion and then I'll make sure I get appearances for others who are of record in the litigation and would like their appearance noted even though they may not be directly involved in it.

First, do I have counsel here on behalf of Pacific Agri-Products, Inc.?

MR. SAWYER: Yes, Your Honor. Good afternoon.

This is Adrian Sawyer from Sawyer & Labar from San Francisco for Pacific Agri-Products, Inc.

THE COURT: Okay. Good afternoon.

And do you not have video available, Mr. Sawyer?

MR. SAWYER: We were unclear as to -- I can get on

1 video immediately.

2 THE COURT: And, you know, I apologize if any lack
3 of clarity was at our end, but it's certainly easier for me
4 I think to kind of follow the flow of the conversation,
5 perhaps for you as well, to have you on video.

6 So if you don't mind dropping off and coming back
7 on by video I will proceed, if it's all right with you, with
8 other appearances and then we'll circle back to you. All
9 right?

10 MR. SAWYER: Terrific. Thank you, Your Honor.

11 THE COURT: Thank you.

12 MR. SAWYER: Will do.

13 THE COURT: All right. Let's turn now to the
14 consumer indirect purchaser plaintiffs.

15 I was told ahead of time that Michelle Looby --
16 well, actually let me start with the commercial and
17 institutional indirect purchaser plaintiffs because they're
18 the ones directly involved in the motion.

19 And Ian McFarland, I see you. Let me hear you.

20 MR. MCFARLAND: Good afternoon, Your Honor. I'm
21 Ian McFarland of Zimmerman Reed LLP for commercial and
22 institutional indirect purchaser plaintiffs.

23 THE COURT: And when you're referring to
24 yourselves by your acronym, what do you call yourselves?

25 MR. MCFARLAND: In writing CIIPPs, but because

1 that's kind of a mouthful I was planning on using commercial
2 indirects today.

3 THE COURT: All right. Very well. Thank you.

4 And I believe I was also expecting Blaine Finley.

5 And I see you.

6 MR. FINLEY: Good afternoon, Your Honor.

7 THE COURT: Okay. And Anthony Carter. Is Mr.

8 Carter on? All right. I don't see him, Mr. Carter.

9 Is there anyone else wanting to have their
10 appearance noted for the commercial indirects? All right.

11 Let's turn back, do we have, Mr. Sawyer yet? Not
12 yet. Okay.

13 Let's turn now to the other parties in the case
14 who aren't necessarily directly involved in this motion.

15 Let's first turn to the direct purchaser -- I'm
16 sorry, the consumer indirect purchaser plaintiffs, the
17 CIPPS. And I was expecting Michelle Looby?

18 MS. LOOBY: Yes. Good afternoon, Your Honor.

19 THE COURT: And Shana Scarlett?

20 MS. SCARLETT: Good afternoon, Your Honor.

21 THE COURT: Is there anyone else who wants their
22 appearance noted for the consumer indirect purchaser
23 plaintiffs?

24 Okay. Turning to the direct purchaser plaintiffs.
25 Brian Clark?

1 MR. CLARK: Yes, Your Honor. Good afternoon.

2 THE COURT: Joseph Bourne?

3 I thought I saw Mr. Bourne.

4 MR. BOURNE: Good afternoon, Your Honor.

5 THE COURT: Okay. And I also -- I thought Mr.
6 Pearson was going to be attending. Is Mr. Pearson on?

7 MR. PEARSON: Yes, I am, Your Honor. Good
8 afternoon.

9 THE COURT: All right. Good afternoon, Mr.
10 Pearson.

11 Anyone else who wants their appearance noted for
12 the direct purchaser plaintiffs?

13 All right. And I think I just admitted, Mr.
14 Sawyer again. We're just going to give him a moment to --

15 Ah, there you are. Mr. Sawyer.

16 MR. SAWYER: Good afternoon. Thank you.

17 THE COURT: Good afternoon. And I can hear you
18 loud and clear, so we'll note your appearance as well.
19 We're still doing appearances.

20 Let's turn now -- hold on a moment. Other people
21 I was expecting to -- or at least told me they were going to
22 be attending on behalf of the Clemens Food Group is Ms.
23 Barsanti on? No? All right.

24 On behalf of Hormel, Mr. Coleman?

25 MR. COLEMAN: Good afternoon, Your Honor. I'm

1 present.

2 THE COURT: Good afternoon. On behalf of Seaboard
3 Foods, Ms. Warr?

4 MS. WARR: Good afternoon, Your Honor. It's war.
5 It's pronounced like it's one R.

6 THE COURT: All right, Ms. Warr.

7 All right. And, Mr. Schwingler, are you on.

8 MS. WARR: Mr. Schwingler will not able to join
9 us, he may appear later during the hearing.

10 THE COURT: Okay. That's fine.

11 I mainly just wanted to make sure that people who
12 wanted to be on the record were.

13 On behalf of Smithfield Foods. So do I have
14 anyone for Smithfield?

15 MR. ROBISON: Yes, Your Honor. Brian Robison from
16 Gibson, Dunn & Crutcher. Good afternoon.

17 THE COURT: Good afternoon, Mr. Robison.

18 Do I have anyone for Triumph?

19 MS. JACOB: Good afternoon, Your Honor. It's
20 Tessa Jacob from Husch Blackwell.

21 THE COURT: On behalf of Tyson Foods? Jared
22 Taylor?

23 MR. TAYLOR: Present, Your Honor.

24 THE COURT: And Tiffany Rider Rohrbaugh?

25 MR. TAYLOR: Like Mr. Schwingler, Your Honor, she

1 may not be able to make it particularly for the first
2 portion of today's hearings.

3 THE COURT: All right. On behalf of JBS USA,
4 Donald Heeman?

5 MR. HEEMAN: Good afternoon, Your Honor.

6 THE COURT: And Mr. -- is it Vagas?

7 MR. VAGAS: Vagas, Your Honor. Good afternoon.

8 THE COURT: Vagas. All right. Good afternoon.

9 And I think that covers the -- the kind of
10 preexisting plaintiffs and defendants in the actions before
11 the MDL.

12 Do any of the counsel for the MDL direct action
13 plaintiffs want to be shown as making their appearance for
14 this hearing?

15 MR. MITCHELL: Your Honor, this is Mike Mitchell
16 from Boies Schiller & Flexner. Not for this hearing. But
17 for the next hearing.

18 THE COURT: All right. Very well. And so I will
19 take role again when we get to the next hearing.

20 And I otherwise -- I think -- have I missed anyone
21 who specifically wants their appearance noted for the
22 hearing on the motion to compel compliance with subpoena
23 directed to Pacific Agri-Products? Nope? All right.

24 Then just a minute. I am going to declutter my
25 screen here and I will ask that anyone who's not going to be

1 speaking to this motion turn off video. If you hear
2 something that you really need to address then turn your
3 video back on and that will be my cue that you'd like to say
4 something. And also it goes without saying that if you are
5 not yet speaking keep your microphone off as well.

6 So, Mr. McFarland, this is your motion. I can
7 see. I can see Mr. Sawyer.

8 So, Mr. McFarland, I will have you go ahead and
9 address the motion?

10 MR. MCFARLAND: Thank you, Your Honor. And may it
11 please the Court and counsel.

12 I'm sure you'll appreciate brevity, so I just want
13 to emphasize a few central points.

14 As you're aware, this motion concerns
15 transactional data that commercial indirects have requested
16 from PacAgri.

17 So to begin with, I'd like to emphasize just how
18 relevant the transactional data is to commercial indirects'
19 claims and how it will materially advance their case.

20 THE COURT: Okay. And in that regard I know that
21 you didn't have an opportunity to reply to their response to
22 your motion, but they obviously raise some specific
23 arguments around relevance as well as some suggestions about
24 ways of limiting the production to -- in a way that might
25 focus on what is more relevant.

1 So if you could particularly make sure that you
2 respond to those -- to those arguments that would be helpful
3 to me.

4 MR. MCFARLAND: I'll do that. Thank you, Your
5 Honor.

6 So to begin with, at class certification
7 commercial indirects are entitled to demonstrate that
8 defendants' conspiracy impacted the prices they paid for
9 pork products and their damages are calculable on a
10 class-wide basis. That includes showing that any overcharge
11 on the price of pork was passed through the distribution
12 chain to them.

13 And the best way to do that is by analyzing the
14 transactional data of direct purchasers like PacAgri that
15 make purchases from defendants and then turned around and
16 sell those same products to indirect purchasers like
17 commercial indirects here.

18 And essentially what will help is that commercial
19 indirects' expert will take that transactional data and use
20 regression analysis to first establish that defendants
21 overcharged direct purchasers like PacAgri on the price of
22 pork. And, second, measure how much of that overcharge the
23 direct purchasers passed through to commercial indirects.

24 This type of regression analysis has been widely
25 accepted by courts and it's really the gold standard for

1 demonstrating price impact to indirect purchaser classes.

2 As a result, courts consistently hold that the
3 transactional data that makes it possible is highly relevant
4 to indirect purchaser class actions.

5 Commercial indirects have cited several cases in
6 the brief to that effect. But the one I'd like to highlight
7 is the *Broiler Chicken Antitrust Litigation* opinion.

8 In that case the underlying allegations were
9 substantially similar to those in this case but in a
10 different meat production industry and there the court
11 declined to quash a subpoena for the same exact type of
12 transactional data.

13 So there's really no question that the
14 transactional data sought by the subpoena is highly relevant
15 to the commercial indirects' case.

16 Now, I know you pointed out that PacAgri took
17 issue in the brief with commercial indirect's substantial
18 use because PacAgri does not conduct the most business with
19 defendants but I think that we'll be able to show that
20 commercial indirects still have a substantial use for
21 PacAgri's data for a couple reasons.

22 And the first is that for the regression analysis
23 the expert will conduct the more data analyzed, the more
24 robust and powerful the analysis.

25 All data moves the needle. It all makes the

1 analysis more robust and the guiding principle here is
2 really the more data the better.

3 And in PacAgri's case we're dealing with purchases
4 from defendants that reflect millions of pounds of pork and
5 that's certainly enough to make the analysis more robust.
6 And that's especially in combination with the data
7 productions of other smaller or midsized distributors.

8 THE COURT: So just so I understand, are you
9 agreeing with them that we -- that the focus of your
10 interest here in terms of what you'd like them to produce is
11 about what they bought from one or more of the defendants in
12 this case? Not the transactions that -- the purchases from
13 nondefendants?

14 MR. MCFARLAND: Right. Yes. We can absolutely
15 agree to that, Your Honor.

16 The only thing that we'd like to make clear is
17 that PacAgri's production also includes its sales data and
18 it's not just limited to its purchase data.

19 THE COURT: Okay. All right.

20 Just out of curiosity, in your meet and confers
21 with Mr. Sawyer or other PacAgri counsel had you been clear
22 that at least on the purchase side you were just looking for
23 purchases from these defendants?

24 MR. MCFARLAND: No. Initially we had requested
25 PacAgri's transactional data for its purchases in the entire

1 pork market. But since the last meet and confer we've
2 revised our position and are now willing to limit the
3 transactional data to purchases with defendants and then
4 sales of those same products.

5 THE COURT: All right. All right.

6 One of the questions I will have for Mr. Sawyer is
7 whether purchases can be linked to sales.

8 And do you have any information -- in other words,
9 do you -- what are you asking for in terms of sales by
10 PacAgri and do those match up with defendants' purchases?

11 MR. MCFARLAND: Yes, Your Honor.

12 If I understand your question correctly, we would
13 be requesting defendants -- or pardon me, PacAgri's sales
14 that reflect sales of products that they have purchased from
15 defendants.

16 THE COURT: Got it. Okay. All right.

17 So I think I believe I understand your relevance
18 argument pretty well and I will want to hear more from Mr.
19 Sawyer and we'll give you an opportunity to respond.

20 But I primarily wanted to see if we could be on
21 the same page at least about limiting the universe of the
22 data you were looking for.

23 Let me ask this. I know that when -- at least
24 when they originally objected to the subpoena they also,
25 among other things, complained about the time -- the scope

1 -- temporal scope of your request.

2 Have you talked to them about that or were you on
3 the same page that if data were going to be produced what
4 the appropriate temporal scope would be?

5 MR. MCFARLAND: We have not discussed that in our
6 meet and confers recently. But our position remains that we
7 would like their transactional data for as long a period of
8 time as they have it in a manner that's reasonably
9 accessible.

10 THE COURT: All right. What -- I'm just looking
11 at your request here because we're talking about Requests 2
12 and 4.

13 So you're asking from 2002 to present. And as
14 we've now established, data specific to purchases from these
15 defendants and sales of product that was purchased from
16 these defendants. But you're still maintaining your request
17 from 2002 to present?

18 MR. MCFARLAND: Correct, Your Honor.

19 If PacAgri has data it's reasonably accessible
20 going back to 2002, we would request that data.

21 THE COURT: And tell me about that importance of
22 2002 and why you're willing to go back that far.

23 MR. MCFARLAND: Yes. Thank you for the question,
24 Your Honor.

25 The reason why we're requesting data going back to

1 2002 is because the expert in his analysis is going to be
2 able to need to compare the price of pork before the time
3 period of the conspiracy that's alleged in the complaint to
4 the price of pork during the period of the time -- during
5 the time period of the conspiracy.

6 So it's essential that we have data from before
7 and after the conspiracy began.

8 THE COURT: Okay. All right.

9 So let's talk a little bit about the concern about
10 with regard to confidentiality.

11 And I will tell you that I'm satisfied that the
12 combination of data that shows purchase and sale, that that
13 mix of structured data is highly confidential so I'm
14 satisfied that it ought to be protected.

15 But I agree with the point you made in your brief
16 that just because it needs to be protected doesn't mean that
17 it isn't discoverable. There are ways of protecting it.

18 I do think thought that they raise some good
19 arguments about the protective order. Because as I read the
20 -- or reread, because I entered it on stipulation, the
21 protective order that you all -- meaning you and the
22 defendants, agreed to in this case, it actually didn't
23 really address nonparties explicitly at all. The language
24 was all around parties and it didn't seem to call for any
25 ways of putting nonparty producers of information on notice

1 if their highly confidential information was going to be
2 used.

3 So have you -- have you looked at that? Have you
4 thought at all about what changes might need to be made to
5 the protective order if I were to order them to produce some
6 part of this information but agree that it was highly
7 confidential?

8 MR. MCFARLAND: Your Honor, I guess I would start
9 by saying that we believe that the protective order does
10 apply to information that's produced by nonparties to the
11 litigation but we are willing to clarify that, if you think
12 that's a change that would be necessary and helpful.

13 THE COURT: Mm-hmm. All right. All right.

14 Let me see if I have any other questions for you,
15 but I may be ready to put Mr. Sawyer on the hot seat. Hold
16 on just a moment. I think -- I'm sure I'm going to have
17 some follow up from you but let me hear from Mr. Sawyer and
18 I will give you a chance to respond in just a moment, Mr.
19 McFarland.

20 So, Mr. Sawyer, as you know, I'm -- and actually,
21 Mr. McFarland, you can stay on screen, I just wanted to -- I
22 was just asking for people who weren't going to be speaking
23 at all to this motion, but I can keep track of four faces,
24 including my own.

25 But in any event, Mr. Sawyer, you heard me say

1 that I'm satisfied with your showing about the
2 confidentiality of this information, so I don't need you to
3 address that. But I do think that Mr. McFarland has made a
4 good case for the relevance of both purchase and sales
5 information, albeit limited to transactions that involved
6 pork purchased from one of these defendants.

7 So, tell me why -- tell me why you shouldn't ought
8 to have to produce that?

9 MR. SAWYER: Certainly. Thank you, Your Honor.

10 I would focus on two points we made in our brief.

11 The first is that many of the, you know,
12 defendants here are competitors. And so PacAgri is a
13 company that has had nothing to do with this litigation,
14 hasn't sought out any relief from the Court, has not
15 involved itself in the proceedings. And is now faced with
16 not just producing its highly confidential information but
17 producing its highly confidential information in context
18 where parties to the lawsuit are its competitors.

19 Its purchases are very, very minor. I think we
20 used graphs from the fourth amended consolidated class
21 action complaint to show that these purchases make up but a
22 small part of the overall market, a small part of the
23 defendants -- the main defendants' market share and there's
24 no showing on the part of the plaintiffs that PacAgri's
25 transactional data is going to move the needle -- be

1 material to any expert at all. No expert has come forward
2 with a declaration.

3 And so I think on that basis alone there's a
4 failure to show that that PacAgri's transactional data, this
5 very small part of this big, big market is necessary and
6 particularly that it's necessary to an extent that it
7 overcomes PacAgri's recognized and significant interest in
8 protecting its confidential -- it's highly confidential
9 commercial information.

10 So that's what I would focus Your Honor's
11 attention on with respect to that point.

12 THE COURT: So not that -- in kind of theoretical
13 terms it's not relevant but it's really just kind of a blip
14 on the scales or lost in the rounding and, therefore,
15 wouldn't be of material value to the plaintiffs in proving
16 whatever it is they would like to prove.

17 MR. SAWYER: That's correct, Your Honor.
18 Particularly where PacAgri has come forward and has taken
19 these steps to protect its information.

20 I can't speak to what other distributors have
21 done. It doesn't really matter. This is what we have done
22 and we're working hard to protect our highly confidential
23 information. And it is, you know, setting aside theoretical
24 relevance, I don't think there's a showing that it's
25 relevant in the overall massive mix of information that the

1 plaintiffs have been able to acquire and they acknowledge
2 acquiring in their papers.

3 THE COURT: With regard to the -- with regard to
4 competition your -- as I understand it, some of the
5 defendants are competitors of yours but it sounds like some
6 of the defendants are suppliers of yours as well. Is that
7 right?

8 MR. SAWYER: Yeah. Defendants who are vendors of
9 ours are also competitors of ours. Because it's not like
10 they sell us products and refrain from selling directly.
11 And we do have situations where, as described in the
12 declaration of Brian Riaparbelli, you know, one of our
13 vendors, we develop a market, the vendor tries to move in
14 and capitalize on that market.

15 THE COURT: But that is the idea that competitors
16 of litigants -- I mean, that comes up all the time, that's
17 true in most, you know, in most intellectual property
18 litigation, certainly true in antitrust litigation and
19 protective orders have long been crafted to try to deal with
20 that and I do think that this protective order would need to
21 be -- would need to be modified to make sure it dealt with
22 that.

23 But what about Mr. McFarland's argument that -- I
24 mean, essentially if everybody who wasn't a defendant said,
25 well, this is highly confidential information and therefore

1 -- and we're just a small player, you don't need it, what
2 they had left wouldn't be enough to make the case that their
3 expert needs to make.

4 MR. SAWYER: So, Your Honor, assuming that that
5 statement is correct, I would point out that it does not
6 seem to be the case here.

7 And so here the plaintiffs have acquired a
8 nationwide cross section of transactional data and it seems
9 that many, many companies have handed over transactional
10 data. So certainly it would -- I would imagine is
11 sufficient for the expert to conduct the regression analysis
12 that plays into the class certification inquiry, which is,
13 you know, are the -- are the overcharges passed through in a
14 way that it lends itself to common proof.

15 The -- you know, PacAgri is not in the same
16 situation as a competitor who comes to court seeking relief
17 against another competitor who invokes the authority of the
18 court for relief pertaining to their intellectual property,
19 for example, in the IP example that Your Honor gave.

20 And we cited to the *Waymo* case from the northern
21 district in which the question was, there is a protective
22 order here, does that warrant forcing this nonparty to
23 produce its confidential information to a competitor, and
24 the Court there determined that the protective order, even
25 though the protective order was in place, production was not

1 warranted, that that nonparty should not be compelled to
2 hand over its highly confidential information to a
3 competitor.

4 So there is -- there is, you know -- there is
5 authority for declining to compel compliance with a subpoena
6 in these circumstances particularly, again, where it's a
7 third-party, it's highly confidential information, a party
8 is a competitor, and there's no showing that this
9 information is going to -- this information, particularly,
10 is going to move the needle on the regression analysis
11 that's underway.

12 THE COURT: Okay. All right.

13 Anything else, Mr. Sawyer, before I give Mr.
14 McFarland a chance to respond?

15 MR. SAWYER: No, Your Honor. Everything else is
16 laid out in our papers.

17 THE COURT: All right.

18 MR. SAWYER: Thank you.

19 THE COURT: Thank you.

20 So, Mr. McFarland, let's talk about the argument
21 then that other than you're saying, well, more is always
22 more is always better, there isn't anything here that shows
23 us that the little bit more that Mr. Sawyer says his client
24 has to contribute is enough better to be worth putting their
25 highly confidential information at risk. And, of course,

1 proportionality analysis requires that kind of balancing.

2 So what kind -- what have you shown me about why
3 what they've got is big enough to make a difference?

4 MR. MCFARLAND: Thank you, Your Honor.

5 You know, to begin with, I'd like to emphasize
6 that it's not just about volume here, it's also about having
7 data from a representative sample of the distributor market.
8 And that's because not all members of the class may make
9 their purchasers from the largest distributors. A classic
10 example of that would be, you know, a restaurant buying
11 local.

12 So in addition to volume we also want to have data
13 sets from distributors that represent the entire range of
14 distributors in the direct purchaser market.

15 THE COURT: Okay. And so what do you already have
16 and what does PacAgri add to that?

17 MR. MCFARLAND: That's a good question, Your
18 Honor. Thank you for asking that, Your Honor.

19 I know we have -- I know we have around ten data
20 sets right now. So, you know, to begin with, when -- we
21 wrote in the brief that we had subpoenaed a nationwide cross
22 section of distributors. We have by no means, you know,
23 received datasets by every single direct purchaser that we
24 subpoenaed.

25 And I can tell you that we are in a push right now

1 to, you know, to collect all of the datasets that we can
2 because doing so will make the expert's analysis that more
3 robust. We think it's meaningful.

4 THE COURT: So is this a situation where there are
5 a lot of small players?

6 MR. MCFARLAND: If -- let me begin to answer that
7 and let me know if I'm not answering that correctly.

8 You know, in the direct purchaser market, you
9 know, there are two very large distributors, you know, in
10 the market.

11 A lot of commerce flows through big players like
12 US Foods and Sysco. But there are also, you know, many
13 smaller distributors and, you know, not all are class
14 members purchase -- make their purchases from the largest
15 distributors like US Foods and Sysco.

16 THE COURT: All right. All right.

17 Anything else, Mr. McFarland?

18 MR. MCFARLAND: Not right now. Thank you, Your
19 Honor.

20 THE COURT: All right. And, Mr. Sawyer, anything
21 further?

22 MR. SAWYER: Only briefly to point out that I
23 think that the response from the plaintiffs in my view
24 consists of argument and I don't think there's been a
25 showing that PacAgri's data will move the needle sufficient

1 to overcome the protection that it's afforded.

2 Other than that I have nothing further, Your
3 Honor. Thank you.

4 THE COURT: Okay. All right. Let me take a
5 couple of minutes off screen here. I want to go back
6 through my notes and see if I feel like I'm in a position to
7 actually rule from the bench on this and whether it's going
8 to require some further study.

9 So I'm going to turn off my microphone. You're
10 welcome to do the same. Just keep an eye on your screen for
11 when I pop back out again. I will turn off the recording
12 for a moment.

13 (Recess at 2:15 p.m.)

14 (Reconvene at 2:25 p.m.)

15 THE COURT: All right.

16 We can back on the record on Docket Number 1024 In
17 Re Pork Antitrust Litigation, the CIIPPs' motion to compel
18 compliance with the subpoena direct to Pacific
19 Agri-Products, Inc.

20 I am going to grant the motion to compel within
21 the following -- kind of within the following parameters.

22 First, I do find that when limited to transactions
23 that involve purchases from the defendants in this case and
24 sales of products made with the pork purchased from the
25 defendants in this case, I do find that that information is

1 relevant.

2 It is -- it may be a relatively small slice but on
3 the other hand a number of small slices can add up to a data
4 collection that does allow for a more robust analysis and
5 can improve both the increased data and more representative
6 data can make a difference there.

7 So I believe that the consumer -- I'm sorry, that
8 the commercial indirects here have demonstrated the
9 relevance of the information they're requesting on both the
10 purchase and the sales side when limited to these
11 defendants.

12 That being said I -- I do agree with PacAgri that
13 the information is highly confidential and I don't believe
14 that the current protective order adequately protects
15 nonparties in the process.

16 Among other things, it doesn't allow for notice to
17 nonparties when their information may be used in
18 depositions. And that's just by way of example. There may
19 be other concerns, but the protective order simply wasn't --
20 doesn't appear to have been drafted with nonparties in
21 mind.

22 So notwithstanding that I am ordering that the
23 information be produced, it's that production will not need
24 to be made until there has been a meet and confer between
25 PacAgri's counsel and counsel for the commercial indirects,

1 for starters.

2 Obviously, Mr. McFarland, you or one of your
3 colleagues is then going to have to play point with respect
4 to the other parties in the case because any change to the
5 protective order ultimately will affect how everybody else
6 does business at least with respect to nonparty information.
7 So there may be a bit of herding cats involved in this, but
8 I don't believe that the current protective order goes far
9 enough to protect the interests of nonparties and that's
10 going to need to be addressed.

11 So what I will ask is that you meet and confer,
12 see if between, at least the parties to this motion you can
13 come up with a proposal that addresses PacAgri's concerns,
14 and I'm not saying they get everything they think they need,
15 but I do think a -- I think there's more that can be done
16 and still allow -- and would still be workable within the
17 framework of this case.

18 So see if you can come up with a proposal that the
19 parties to this motion agree gets the job done. And then,
20 Mr. McFarland, you or one of your colleagues, as I said,
21 will need to run point with one of the parties.

22 What I would like at the end of this, ideally, is
23 a stipulation to amend the protective order that everybody
24 can agree to and that I can simply enter.

25 If not, if there are -- is agreement on a great

1 deal of it but still some parting of company on some of it,
2 then what I would suggest is that you submit a proposed
3 amended protective order, as you have done with some other
4 things along the way, a proposed amended protective order
5 that shows me what you agree on and where you disagree with
6 the competing proposals for those sections. And if I need
7 to schedule another hearing to talk that through I can if
8 you want to submit -- I think to start with it might make
9 sense to show me the separate proposals and then have the
10 parties accompany that, including the nonparty, PacAgri --

11 MR. SAWYER: Thank you, Your Honor.

12 THE COURT: -- accompany that with an appropriate
13 letter brief to address why you disagree with the -- or
14 agree with the proposal being made.

15 I'd like to see all of that -- I know we're
16 dealing with the holidays, let me ask -- well, let me just
17 ask the question, understanding that that's the deliverable
18 I'm looking for, what would you propose by way of a
19 reasonable deadline for getting me that deliverable?

20 Mr. McFarland, you've probably got the heavier
21 lift here because you've got to deal with two different or
22 maybe three different sets of constituents.

23 What seems like a reasonable delivery date?

24 MR. MCFARLAND: Thank you, Your Honor.

25 This is just actually the one question I did not

1 prepare for. Let's see.

2 THE COURT: Let me see. I will suggest something
3 and you can tell me if it seems reasonable. And obviously,
4 Mr. Sawyer, I'll give you a chance to weigh in as well. As
5 I say, I do note we have holidays coming up. I was
6 thinking -- hold on just a moment -- about, well, let me ask
7 whether January 7th seems reasonable. I would think that's
8 the earliest you could probably put all of this together.

9 So let me toss out January 7th as an idea and get
10 a reaction to it. Mr. McFarland?

11 MR. MCFARLAND: That's acceptable to the consumer
12 indirects.

13 THE COURT: Okay. And, Mr. Sawyer, that seems
14 like something --

15 MR. SAWYER: Yes.

16 THE COURT: -- that you can do, as well?

17 MR. SAWYER: Yes, Your Honor. Thank you.

18 THE COURT: So I'm not going to do a written order
19 on the specific ruling on this motion, it will be reflected
20 in the minute entry and, of course, in the transcript but
21 obviously once we get something we can work with in the way
22 of an amended protected order, that obviously will be in
23 writing on the record.

24 That said, are there any questions about this
25 ruling?

1 Mr. McFarland, any questions from you?

2 MR. MCFARLAND: No questions. Thank you very
3 much, Your Honor.

4 THE COURT: Mr. Sawyer, any questions?

5 MR. SAWYER: No questions. Thank you, Your Honor.

6 THE COURT: All right. Thank you both.

7 So we have a hearing on an IDR involving different
8 sets of litigants here.

9 What I'm going to do is we're going to make that a
10 separate -- we're going to make it a separate hearing and
11 we'll have separate minutes.

12 Mr. Sawyer, you're certainly excused. Your party
13 is done and we won't be revisiting yet in the next part of
14 the hearing. So this hearing is adjourned.

15 MR. SAWYER: Thank you.

16 THE COURT: I am going to turn off the -- I'm
17 going to stop the recording for this hearing, and then let's
18 take a well, let me ask our court reporter. Do you need --
19 we have told people we would start at 3:00 and what I don't
20 know is whether we've got everybody we need.

21 So I'm going to stop the recording, go off the
22 record, see who we've got and see whether we need to wait
23 for some other folks to show up.

24 (Hearing is adjourned at 2:34 p.m.)

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REPORTER'S CERTIFICATE

I certify the foregoing pages of typewritten material constitute a full, true and correct transcript of my original stenograph notes, as they purport to contain, of the proceedings reported by me at the time and place hereinbefore mentioned.

/s/Lynne M. Krenz
Lynne M. Krenz, RMR, CRR, CRC